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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-5731

STANLEY BROWN,

Petitioner,

v e r s u s

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IRVIN M. KENT
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STANLEY BROWN

DECEMBER 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

STANLEY BROWN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on September 4, 1979, and the Order of Court denying rehearing entered on November 5, 1979.

CITATIONS TO OPINIONS BELOW

The Order of the United States District Court for the District of Colorado, together with the Court's Findings on Motion under Rule 36, Federal Rules of Criminal Procedure, filed on May 10, 1979, is not reported and is appended hereto as Appendix A.

The Opinion of the Tenth Circuit Court of Appeals which dismissed the Appeals is not reported and is appended hereto as Appendix B.

The Order of the United States Court of Appeals denying the Petition for Rehearing is appended hereto as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1).

The jurisdiction of the United States Court of Appeals for the Tenth Circuit was invoked under the provisions of 28 U.S.C. Section 1291.

QUESTION PRESENTED

Whether a person convicted of felonies in a United States District

Court and promptly incarcerated may be denied his right of appeal where his notice of appeal was apparently lost or misfiled in the Office of the Clerk of the District Court and his appointed counsel did not adequately pursue the matter to preserve those appellate rights?

FEDERAL STATUTES INVOLVED

The following rules are set forth in Appendix D.

Federal Rule of Appellate Procedure, Rule 3.

Federal Rule of Criminal Procedure, Rule 36.

STATEMENT OF THE CASE

1. Petitioner was convicted in three separate trials for bank robbery under the provisions of 18 U.S.C., Section 2113(a) and (d), and final judgment was rendered in case numbers 76-CR-139 and 76-CR-138 on October 4, 1979, and in 76-CR-142 on October 8, 1979. Petitioner is now confined in the United States Penitentiary at Leavenworth, Kansas, serving sentences which total forty-five years.

2. For reasons that are not wholly clear, notices of appeal in each of these three cases were not properly recorded in the Office of the Clerk of the District Court. Appellant's then Court-appointed counsel claims to have delivered such notices to Deputy Clerk of the District Court on October 8, 1976 (Affidavit of March 22, 1979). The Deputy Clerk, Mr. Stephen P. Ehrlich, while admitting to meeting with Mr. Hamby and the Appellant, neither confirms nor denies the critical portion of Mr. Hamby's affidavit (Affidavit of March 9, 1979).

3. On March 28, 1979, James J. Morrato, Esquire, specially appointed counsel for Appellant, filed a Motion to Correct Clerical Mistake pursuant to Rule 36, Fed. R. Crim. P., to establish the date and fact of the filing of Notices of Appeal in these three cases.

4. On May 8, 1979, Chief Judge Winner of the United States District Court for the District of Colorado, held a hearing on said Motion, and entered Findings thereon on May 10, 1979 (Appendix A).

5. On May 11, 1979, Chief Judge Winner and Judge Matsch appointed undersigned counsel to file an appeal in each of these

three cases.

6. On May 17, 1979, undersigned counsel filed notices of appeal in each of these three cases in the Office of the Clerk of the United States District Court for the District of Colorado.

7. On June 4, 1979, undersigned counsel filed a designation of record on appeal essentially limited to the documents referred to above plus the transcript of the hearing on May 8, 1979 (with the idea of filing a supplemental designation of the entire transcripts of the trials after the Court of Appeals determined that it had jurisdiction to entertain and determine these appeals).

8. On June 14, 1979, undersigned counsel for Petitioner filed a Motion to Obtain a Determination of Jurisdiction and for a Stay of All Other Appellate Requirements Pending Determination of the Jurisdiction of the United States Court of Appeals for the Tenth Circuit. The United States filed nothing in opposition to such Motion.

9. On September 4, 1979, the Court of Appeals dismissed the appeal (Appendix B).

10. On September 18, 1979, undersigned counsel filed a Petition for Rehearing, which was denied by the Court of Appeals on November 5, 1979 (Appendix C).

REASONS FOR GRANTING THE WRIT

Through no fault of his own, Petitioner, who stands convicted of three felonies and is serving forty-five years' imprisonment, has been effectively denied any appellate review of his convictions.

The merits of any such appeal are unknown to undersigned counsel at this time and are unimportant to the questions presented for consideration by this Honorable Court.

No matter how they are worded, the questions boil down simply to the fact that through neglect or inadvertance of appointed counsel after the trials, and/or that the Office of the Clerk of the United States District Court, Mr. Brown has been denied the right of appeal and denied the right of effective assistance of counsel in perfecting such appeals.

The decision of the United States Court of Appeals in this case elevates form over substance in a way inconsistent with the decisions of this Honorable Court and with those of the Court of Appeals in

other circuits.

The denial of jurisdiction by the District Court to make findings in the Rule 36 proceedings was an implicit finding that the notice of appeal had been filed and that jurisdiction was now vested solely in the Court of Appeals (Hogg v. United States, 411 F.2d 578 (6th Cir. 1969)). Thus, the May 1979 Order and Finding of the District Court was not adverse to Mr. Brown and he could not appeal that Order (White & Yarborough v. Dailey, 228 F.2d 836,837 (5th Cir. 1955)).

If the notices of appeal filed by the undersigned counsel in May 1979 were improper, they were merely redundant and the appeal should proceed on the merits of the earlier (lost) notices of appeal (United States v. Pardee, 356 F.2d 982 (4th Cir. 1956)). Actual points of error are set forth in later papers rather than in the notice of appeal (Roth v. Hyer, 142 F.2d 227, 228 (5th Cir. 1944), cert. den. 323 U.S. 712)).

Incomplete compliance with Rule 3(c), Fed. R. App. P., should not result in loss of an appeal on the merits (Wright v. American Home Assurance Company, 488 F.2d 361, 363 (10th Cir. 1973); Jones v. Nelson, 484 F.2d 1165, 1168 (10th Cir. 1973)).

The notice of appeal must be read together with other appeal papers to determine what is being appealed. A notice of appeal, even if inept, so long as it does not mislead or prejudice the other party (and there is nothing to indicate that the United States was so misled or prejudiced in the case at bar) should not be a basis for avoiding a decision of the merits (Forman v. Davis, 371 U.S. 178, 181, 83 S.Ct. 227, (1962); Herron v. Rozelle, 480 F.2d 282, 285 (10th Cir. 1973)).

In determining whether the notice of appeal is in sufficient compliance with Rule 3(c), F.R.A.P., the appellate court may look to other documents filed with it, to determine the order or judgment, or parts thereof, which the appellant intended to appeal. (Blitzstein v. Ford Motor Company, 288 F.2d 738, 740 (5th Cir. 1961); Sun-Lite Awning Corporation v. E. J. Conklin Aviation Corporation, 176 F.2d 344, 345 (4th Cir. 1949).)

The United States made no opposition to the Motion to Correct Clerican Errors filed in the District Court, nor to the Motion filed by this counsel in the Court of Appeals.

CONCLUSION

For the reasons set forth herein, the Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

IRVIN M. KENT Reg. No. 10
315 Symes Building,
820 - 16th Street
Denver, Colorado 80202

Telephone: (303) 623-1355

ATTORNEY FOR PETITIONER,
STANLEY BROWN

CERTIFICATE OF HAND-DELIVERY

This is to certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was served by hand-delivery this 5th day of December, 1979, to the Office of the United States Attorney for the District of Colorado.

At Denver, Colorado.

IRVIN M. KENT

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
MAY 10 1979
JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-138

UNITED STATES OF AMERICA, Plaintiff, vs. STANLEY BROWN, Defendant.	FINDINGS ON MOTION UNDER RULE 36 FED. R. CRIM. P.

This matter came before the Court on May 8, 1979 for hearing on the Motion to Correct Clerical Mistake Pursuant to Rule 36 of the Federal Rules of Criminal Procedure. The Court having reviewed the file in this matter, the Affidavits in support of the Motion, and after hearing the arguments of counsel finds as follows:

1. On or about October 8, 1976, following the imposition of sentence in Criminal Action No. 76-CR-142, the Defendant, his appointed counsel, Elmer Lee Hamby, and a deputy clerk of this Court, Mr. Stephen P. Ehrlich met in the offices of the United States Marshal for the District of Colorado.

2. At this time, the clerk of this Court notarized the Affidavits of the Defendant to support his Motion to Proceed on Appeal in forma pauperis to secure review of these convictions in the Tenth Circuit Court of Appeals.

3. With respect to the question of whether appointed trial counsel for the Defendant filed a Notice of Appeal in this criminal action on October 8, 1976 or any time thereafter within the time prescribed under Rule 4 of the Federal Rules of Appellate Procedure, this Court's jurisdiction is limited and this Court, under such limited jurisdiction, finds, upon the record presented to this Court, that a Notice of Appeal may have

been handed to the deputy clerk of this Court in the Marshal's Office on October 8, 1976. This Court does not have jurisdiction to find that a Notice of Appeal was filed by appointed counsel in the offices of the clerk of this Court.

4. At the hearing held with respect to the Motion filed on behalf of the Defendant pursuant to Rule 36 of the Federal Rules of Criminal Procedure, the United States of America stated that it did not oppose the Motion of the Defendant, did not contest the factual accuracy of the facts asserted in the Affidavits filed in support of the Motion, did not desire to offer any evidence in connection with the Motion and did not desire to cross-examine the Affiants, both Affiants being present in Court and available for testimony.

DONE this 10 day of May, 1979 in open Court.

Fred M. Winner

Fred M. Winner, Chief Judge

NOT FOR ROUTINE PUBLICATION

FILED
United States Court of Appeals
Tenth Circuit
SEP 4 1979
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	NOS. 79-1539
vs.	)	79-1540
	)	79-1541
	)	
STANLEY BROWN,	)	
	)	
Defendant-Appellant.	)	

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

(D. C. NOS. 76-138 CR, 76-139 CR, and 76-142 CR)

Irvin M. Kent filed a motion to obtain a determination of jurisdiction and for a stay of all other appellate requirements pending determination of the jurisdiction of this court on behalf of appellant.

Before SETH, Chief Judge, BARRETT and LOGAN, Circuit Judges.

app B

PER CURIAM

These are attempted direct criminal appeals from judgments entered in the United States District Court for the District of Colorado. Appellant has filed a motion to obtain a determination of jurisdiction and for a stay of all other appellate requirements pending determination of the jurisdiction of this court. The judgments were entered on October 4 and October 8, 1976.

Stanley Brown was convicted in separate jury trials of three aggravated bank robberies. Following the first two trials appellant was sentenced on October 4, 1976. Following the third conviction, sentence was imposed on October 8, 1976. Appellant is serving a term not to exceed forty-five years.

Appellant was represented at trial by appointed counsel. No notices of appeal were entered on the docket sheets until May 17, 1979 following the hearing on appellant's Rule 36 motion to correct clerical mistake. The notices of appeal filed at that time were only from the judgments of conviction and an appeal was not taken from the district court's findings on the Rule 36 motion.

It should be noted that following the 1976 convictions not only were no notices of appeal filed but, further, no record was designated, and no docketing statement or other appropriate action was taken at the court of appeals level. However, appellant Brown apparently did desire to take an appeal and wrote to the court in February 1977 requesting information with respect to the status of his appeal.

Nothing more was done with this appeal until in March 1979 specially appointed counsel filed a motion to correct clerical

mistake pursuant to Rule 36, Fed.R.Crim.P. The important factual allegations of this motion were that following imposition of the final sentence on October 8, 1976 appointed counsel conferred with his client in the Marshal's Office, had a notice of appeal in his possession at that time, and had a United States District Court deputy clerk notarize defendant's affidavit in support of his application to appeal in forma pauperis. Crucially, counsel contends that the notice of appeal was given to the deputy clerk at that time, but through oversight or unintended omission the notice of appeal was not entered on the docket. With the Rule 36 motion were filed affidavits by the appointed trial counsel and the deputy clerk. Trial counsel's affidavit stated that he provided the executed notices of appeal to the deputy clerk and requested that the deputy clerk file them. He stated that the deputy clerk agreed and took the notices of appeal with him. The deputy clerk's affidavit simply stated that he did in fact go to the Marshal's Office that day and notarized the signatures defendant placed on various affidavits which were necessary to implement the appeals in forma pauperis. The district court docket sheet does not reflect that even the petition for leave to appeal in forma pauperis was timely filed. Such filing might have satisfied the requirement for timely filing a notice of appeal. See Bowman v. United States, 483 F.2d 433 (5th Cir. 1973); Tillman v. United States, 268 F.2d 422 (5th Cir. 1959).

A hearing on the motion was held by the two trial judges on May 8, 1979. Appellant's counsel presented his contentions. The government did not contest the correctness of the affidavits. Appellant did not adduce testimony from the affiants, although they were both available, so the deputy clerk and appellant's trial counsel were not examined regarding the asserted tender of the notices of appeal. At the

conclusion of the hearing Chief Judge Winner emphasized, and the court's findings reflect this, that a notice of appeal in these cases may have been handed to the deputy clerk of the district court. But the judge expressly refused to find that a notice of appeal was tendered to the clerk with a request that it be filed and the district court thought that it was without jurisdiction to find that a notice of appeal was filed in the cases.

With the cases in this posture, Brown now seeks a determination of appellate jurisdiction to review these convictions. He appears to argue that the spirit of United States v. Lucas, 597 F.2d 243 (10th Cir. 1979) (remanding to give appellant time to move for a thirty-day extension based upon excusable neglect) would permit an appeal at this late date. Counsel's understanding was that on appeal Brown wants to challenge the district court's granting of the government's motion to vacate his earlier pleas based upon his failure to cooperate with a state prosecution.

To obtain review of the underlying criminal convictions, appellant would have had to establish that he filed timely notices of appeal. Based upon the hearing proceedings the district court concluded that it was without jurisdiction to find that a notice of appeal was filed by appointed counsel in the Office of the Clerk of the District Court. The district court's findings on the Rule 36 motion could have been raised as issues on appeal. There is, however, a ten-day appeal period from denial of a Fed.R.Crim.P. 36 motion to correct clerical errors. Kirksey v. United States, 219 F.2d 499, 502 (D.C.Cir. 1954), cert. denied, 358 U.S. 848 (1958). Appellant has taken no appeal from the Rule 36 motion findings. Thus, this court cannot review the district court's conclusion that appellant's counsel may have handed a notice of appeal to a

district court deputy clerk on October 8, 1976 but that no notice of appeal was timely filed with the clerk.

With no timely notices of appeal filed from the judgments entered October 4 and 8, 1976, this court is without jurisdiction to review the convictions. Gooch v. Skelly Oil Company, 493 F.2d 366 (10th Cir.), cert. denied, 419 U.S. 997 (1974).

Appeals dismissed.

SEPTEMBER TERM - November 5, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges, United States Court of Appeals.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
	)	Nos. 79-1539
v.	)	79-1540
	)	79-1541
STANLEY BROWN,	)	
	)	
Defendant-Appellant.	)	

Appellant has filed a petition for rehearing with a suggestion for rehearing en banc.

The petition for rehearing, treated as a motion to recall the mandate, is denied as it presents no substantial issues not previously considered by the court.

HOWARD K. PHILLIPS
Clerk

By: Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

App. C

No. 79-5731

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

STANLEY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5731

STANLEY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that he has improperly been denied the right to appeal his convictions.

1. Following separate jury trials in the United States District Court for the District of Colorado, petitioner was convicted in October 1976 of three aggravated bank robberies, in violation of 18 U.S.C. 2113(a) and (d). Petitioner was sentenced to a term in prison not to exceed 45 years.

The subsequent proceedings followed an unusual course that has resulted in petitioner's failure to obtain appellate review of his convictions. Petitioner claims that after he was convicted his court-appointed counsel filed notices of appeal from the convictions. However, no notices of appeal appear on court records and no appeal was docketed. Petitioner contacted the court in February 1977 seeking information about the status of his appeal, but apparently there was no immediate action taken on his request. In March 1979, newly appointed counsel filed a motion under Rule 36, Fed. R. Crim. P., to correct the clerk's records so that they would reflect that a notice of appeal was timely filed from petitioner's convictions.

At the hearing on the motion, petitioner claimed that his trial counsel filed a notice of appeal with a deputy clerk of the district court, but that because of a clerical error the notice was never docketed. Petitioner introduced an affidavit from his trial counsel stating that he had executed a notice of appeal and given it to a deputy clerk, requesting that the deputy clerk file it. The affidavit also stated that the deputy clerk took the notice of appeal and agreed to file it. The affidavit of the deputy clerk, also introduced at the hearing, stated only that he recalled taking various affidavits necessary to processing petitioner's in forma pauperis appeal to the U.S. Marshal's Office for notarization. The government did not oppose petitioner's Rule 36 motion.

The trial court ruled that a notice of appeal may have been handed to the deputy clerk for filing, but that the court "lacked jurisdiction" to find that a notice of appeal had, in fact, been filed.[1/] Accordingly, on May 10, 1979, the court denied the Rule 36 motion.

On May 17, 1979, petitioner filed a notice of appeal from the original convictions but did not expressly specify that the appeal was also from the denial of the Rule 36 motion. Appellate counsel then brought the foregoing facts to the attention of the court of appeals and requested a ruling on that court's jurisdiction (Pet. App. 4). The court of appeals dismissed the appeal, holding that no timely notices of appeal were filed from the original convictions, and the May 17, 1979, notice of appeal neglected to specify that petitioner appealed from the denial of his Rule 36 motion. The court concluded that it had no jurisdiction to review either action.

1/ The court stated at the Rule 36 hearing that the court was unwilling to find that the clerk failed to file the notice of appeal (even though the clerk had "no recollection of it one way or the other") simply because it would be "very embarrassing" for the clerk (Transcript, May 8, 1979, at 23). We are lodging this transcript and other filings in the courts below with the Clerk of this Court.

2. We do not oppose the petition for a writ of certiorari. While petitioner's notice of appeal would have been more precise had it specified that it sought review of the denial of the Rule 36 motion as well as of his underlying convictions, we believe that, at least under the particular circumstances of this case, the court of appeals should have construed the notice to comprehend review of both actions. The notice was obviously intended to comprehend both, for the court of appeals could review the convictions only if it reversed the Rule 36 determination made by the district court. Petitioner followed through on this intent by promptly seeking an appellate determination of jurisdiction in the court of appeals. The court of appeals therefore erred in refusing to review the Rule 36 determination. See Foman v. Davis, 371 U.S. 178, 181-182 (1962); Scherer v. Kelly, 584 F.2d 170, 174 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979); Cobb v. Lewis, 488 F.2d 41, 44-45 (5th Cir. 1974).

On the merits, we believe that the district court erred in holding that it lacked jurisdiction to determine whether a timely notice of appeal from his original convictions was filed by petitioner's attorney. Rule 36 of the Federal Rules of Criminal Procedure, like Rule 60(a) of the Federal Rules of Civil Procedure, permits the court to correct "errors in the record arising from oversight or omission" at any time. An error resulting from the failure of a deputy clerk to record the filing of a notice of appeal on the docket constitutes the kind of error of omission or oversight that can be corrected by a court under Rule 36. 2/

2/ Cf. Schwartz v. Pattiz, 386 F.2d 300 (8th Cir. 1968) (trial court properly corrected the record under Fed. R. Civ. P. 60(a) to reflect that an amended complaint had been filed); National Equipment Rental, Ltd. v. Figurine Salon of California, Ltd., 19 F.R. Serv. 2d 1426 (E.D.N.Y. 1975) (trial court corrected record under Fed. R. Civ. P. 60(a) to reflect that an answer was timely filed).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and the case remanded to the court of appeals for a ruling on the merits of petitioner's appeal from the denial of his Rule 36 motion.

WADE H. McCREE, Jr.
Solicitor General

FEBRUARY 1980